92-1382

No.——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CAPTRAN CREDITORS' TRUST, CLUB BAHA, LTD. and TROPICAL PROPERTIES, LTD.,
Petitioners,

v.

DAVID W. MCCONNELL, GERARD A. MCHALE, JR. and MCHALE, EZZELL & CO., P.A.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is it against federal public policy for trustees in a federal bankruptcy proceeding, including a certified public accountant, to be insulated from liability for willful breaches of their fiduciary duties by a Trust Agreement clause allowing recovery only for "proven dishonesty"?

PARTIES TO THE PROCEEDINGS

Petitioner and Plaintiff-Appellant below, Captran Creditors' Trust, is a Trust organized under the laws of the State of Florida. Petitioner and Plaintiff-Appellant below, Club Baha, Ltd., is a non-publicly traded holding company organized under the laws of the Bahamas. Pursuant to Supreme Court Rule 29.1, petitioners note that Club Baha, Ltd. is a wholly owned subsidiary of Tropical Properties, Ltd.

Respondents and Defendant-Appellees below are David W. McConnell, Gerard McHale, Jr., and McHale, Ezzell & Co., P.A.

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CAPTRAN CREDITORS' TRUST, CLUB BAHA, LTD.
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DAVID W. MCCONNELL, GERARD A. MCHALE, JR.
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Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Captran Creditors' Trust, Club Baha, Ltd., and Tropical Properties, Ltd., respectfully pray that this Court issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on November 10, 1992.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals affirming the decision of the United States District Court for the Middle District of Florida is not officially re-

ported and is reprinted in the appendix hereto ("App.") at 1a. The opinion of the District Court, which affirmed the decision of the United States Bankruptcy Court, is not officially reported and is reprinted at App. 2a. The Bankruptcy Court's opinion denying the relief sought by petitioners is not officially reported and is reprinted at App. 20a.

JURISDICTION

Jurisdiction in the Bankruptcy Court was based upon provisions of the Captran Creditors' Trust Agreement, which arose from a Plan of Reorganization approved on June 13, 1988. The Bankruptcy Court entered its Findings of Fact, Conclusions of Law and Memorandum Opinion on April 14, 1990, and a final judgment was entered on April 17, 1990. Petitioners filed a timely notice of appeal in the United States District Court for the Middle District of Florida on April 27, 1990, and the District Court affirmed the judgment on June 17, 1991. Petitioners filed a timely notice of appeal to the United States Court of Appeals for the Eleventh Circuit, which affirmed the lower court's decision on November 10, 1992. The jurisdiction of this Court to review the judgment below is invoked under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

None.

STATEMENT OF THE CASE

A. Factual Background

Petitioners Club Baha, Ltd. and Tropical Properties, Ltd. obtained a $1.7 million final judgment in Fort Myers, Florida Circuit Court against Captran Resorts International (CRI) based on CRI's violation of escrow requirements, breaches of fiduciary duties, and misrep-

resentations or concealment.[1] CRI was owned and/or controlled by Keith Trowbridge. In order to avoid payment of the judgment, CRI filed for Chapter 11 bankruptcy protection. During the bankruptcy, the "Captran Creditors' Settlement Agreement" was signed, which created a Trust to receive, liquidate and distribute CRI's assets[2] to the CRI creditors/Trust beneficiaries. Respondent Gerard McHale, Jr. negotiated the Agreement for Petitioner Club Baha and had direct input into its preparation and drafting. This Agreement also created Petitioner Captran Creditors' Trust (CCT), which was to acquire the majority of CRI's assets. The trust was created solely to take CRI assets out of its control.

Respondents McHale, a Certified Public Accountant (CPA), and David McConnell, an attorney, were appointed Trustees. McHale was simultaneously engaged as a CPA by Club Baha, thus becoming a co-trustee, and continuing to act as a CPA, on Club Baha's behalf. Respondent McHale, Ezzell & Company (M.E.C.) was an accounting firm owned by McHale and retained by Club Baha to perform services in connection with the Trust. CCT acquired specific assets from CRI and assumed only those liabilities listed in the Contract for Purchase. The assets were marketed and sold. Club Baha, the largest beneficiary, never received any proceeds at all; they instead went to CRI.

Sales of Trust properties were made through a real estate firm owned and controlled by Trowbridge, and

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[1] Respondent-Trustee, Gerard McHale, Jr. (McHale) was Club Baha's expert accountant witness at the trial against CRI. He filed a "special report" in those proceedings detailing alleged wrongs committed by CRI.

[2] The trust assets included 1400 timeshare unit weeks at five different resort properties, undeveloped land, two mortgage loan reserve portfolios, and a promissory note. These assets were valued by the Trustees in the Trust Agreement at approximately $6,800,000.

they were processed through his title company. Trust property sales records were under the exclusive control of CRI's controller, George Mills, and the trial court found that McHale accepted his recordkeeping without question or verification, and that neither McHale nor McConnell kept any sales records.

Although the Trust was created for the specific purpose of liquidating the Trust assets, respondents allowed CRI to continue to develop and build on undeveloped properties conveyed to the Trust. As the trial court found, the record left no doubt that the Trustees agreed to this activity.

The Trustees were discharged in August 1984, and McHale submitted his final report. As the trial court found:

> By all accounts, this report did not even come close to being an acceptable final accounting of a trustee, and it did not pretend to be one. The report was nothing more than a compilation of the Trust assets and the beneficiary interests that existed at the time the Trust was created; it did not reflect what really existed when McHale's Trusteeship ended. [App. 25a.]

The Petitioners filed an adversary proceeding Complaint for the Trustees' breaches of their fiduciary duties, for the professional negligence of McHale and M.E.C., and for Florida Statutes Chapter 772 violations. McHale and M.E.C. raised defenses, while McConnell was defaulted for failing to file an Answer or make any further appearances in the case.

The allegations in the Amended Complaint were tried in a non-core suit to the Bankruptcy Court, which issued its Memorandum Opinion in 1990. The court reviewed volumes of evidence demonstrating departures from trustee norms, variations from and breaches of duties, and violations of a CPA's duty of care to his client, Club Baha.

The evidence at trial showed that among the breaches by the Trustees were the following:

- Letting CRI sell Trust assets and mortgage reserve assets at "fire sale" values.[3]
- Letting CRI keep Trust proceeds.
- The payment of illegal and unearned commissions to CRI, an unlicensed realtor, on sales that had not closed (in violation of Chapter 475, Florida Statutes).[4]
- Allowing cash assets that should have been paid to CCT beneficiaries to be "laundered" back to CRI.
- Letting CRI develop Trust property, contrary to the stated purpose of the Trust.
- Not complying with state Regulations.
- Letting untimely claimants opt in as Trust creditors.

Evidence also demonstrated that the wasting of trust assets was secreted by:

- Not maintaining Trust records.
- Not terminating in a timely fashion the CRI marketing arrangement.

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[3] The General Electric Credit Corporation loan portfolio was valued at $752,293 on November 19, 1982, in the Trust Agreement itself, the drafting of which McHale participated in. Shortly after the valuation, McHale sold the loan portfolio for $17,000 cash. Trial Tr. pp. 293, 294, 301.

[4] McHale prepaid 38% commissions to CRI on unit sales that had not closed even though the Trust Agreement explicitly called for payment of commissions upon closing only. Trial Tr. pp. 277, 278. In addition, CRI was not licensed to sell timeshare interests as required by Florida Statutes Chapter 475. McHale made no attempt to verify CRI's status as it related to timeshare sales and, in fact, acquiesced in the payment of commissions to a non-real estate broker.

- Not providing an Annual Accounting.
- Letting a competing interest "ghostwrite" the Final Accounting.
- Distributing a deficient and misrepresentative Final Accounting.

The trial court, although at one point stating that McHale's performance did not fall below CPA standards, made a series of factual and legal conclusions that respondents' actions—whether judged by attorney or CPA standards, or simply by those applicable to ordinary Trustees—fell well below what the law demands of fiduciaries. For example:

> . . . [T]here is no doubt that McHale accepted the recordkeeping of Mills without question or without verification. [App. 23a.]
>
> * * * *
>
> [The] [e]vidence . . . leaves no doubt that neither McHale nor McConnell kept any records regarding the sales transactions. . . . [*Id.*]
>
> * * * *
>
> [McHale and McConnell] simply let Trowbridge and [Trowbridge's title company] handle all details regarding the sales and recordkeeping of CRI. [*Id.*]
>
> * * * *
>
> The record leaves no doubt that the Trustees agreed, at least tacitly, to [CRI's continued development activity] and at no time voiced objection to it. [*Id.*]
>
> * * * *
>
> By all accounts, this report [McHale's final accounting] did not even come close to being an acceptable final accounting of a Trustee, and it did not pretend to be one. [App. 25a.]
>
> * * * *
>
> This record leaves no doubt that the conduct of McHale as a Trustee certainly left a lot to be desired. . . . [App. 26a.]

> [McHale's] detached, lackadaisical attitude toward the Trust affairs may be charitably characterized at most as benign neglect. [*Id.*]
>
> * * * *
>
> McHale's lack of involvement with the Trust was clearly evidenced by his unquestioned acceptance of the Mills Report as a final accounting of his Trusteeship. [*Id.*]
>
> * * * *
>
> [I]t is clear from the record that McHale granted almost a complete free reign to Trowbridge, Mills and [Trowbridge's title company] involving sales of trust assets, sales closings, and the recordkeeping of the Trust assets. [*Id.*]
>
> * * * *
>
> [I]f McHale's performance is measured by the standard of a CPA who was engaged to serve in that capacity, one would be hard pressed to conclude that his performance met the standards of a reasonable CPA. [App. 26a.]
>
> * * * *
>
> . . . McHale might have acted beneath the standard of sound business practices. . . . [App. 28a.]

The reason the trial court did not have to decide finally whether respondents breached their fiduciary duties —despite the findings outlined above—is that in any event they were exculpated by a clause in the Trust Agreement which read: "Except for proven dishonesty, a Trustee will not be personally liable for any act or omission in connection with his duties as Trustee." [5]

Thus, the trial court stated its satisfaction that "although McHale might have acted in a less than professional manner and may possibly have acted beneath the

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[5] The Bankruptcy Court effectively adopted and enforced the Trust Agreement in a series of orders. *E.g.*, Order of Dismissal of Bankruptcy Proceedings, Dec. 6, 1982; Order Approving Sale of Assets, Dec. 6, 1982. See also App. 22a, 27a-28a.

standard of sound business practices, he was not dishonest." App. 28a.[6]

Petitioners appealed to the Federal District Court for the Middle District of Florida pursuant to 28 U.S.C. § 158. The District Court, while not disturbing the underlying facts found by the Bankruptcy Court, apparently misunderstood that court's legal conclusions. The District Court thought the Bankruptcy Court had held in the alternative that petitioners had failed to carry their burden of proving violations of fiduciary duties *and* that, in any event, respondents were exonerated by virtue of the exculpatory "dishonesty" clause in the Trust Agreement. The District Court therefore affirmed. Perhaps under the same misunderstanding, the Eleventh Circuit affirmed without opinion.

REASONS FOR GRANTING THE WRIT

This case presents a serious question of federal public policy that goes to the very heart of bankruptcy law and of fiduciary trustee duties generally. The Bankruptcy Court clearly found that the Trustees in this case displayed "detached, lackadaisical" attitudes toward their duties, granted complete reins of power to others (including those owned and controlled by the bankrupt party), exhibited "benign neglect" instead of the required heightened duty of care, and generally conducted themselves in a manner that "left a lot to be desired."

Yet they were held to be exempt from normal standards because of an exculpatory clause relating to outright dishonesty. Giving commanding effect to this clause allows fiduciaries to behave in the most outrageous manner short of what the Bankruptcy Court deemed to be self-dealing

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[6] There is no evidence in the record that the beneficiaries ever specifically discussed the meaning or intent of the "proven dishonesty" exculpation clause with anyone, including but not limited to their legal or accountant representatives.

or profit-taking from the bankrupt estate. Thus, the Trustees can wholly ignore their duties, carry them out in a way that conflicts with the interests of the creditors and other Trust beneficiaries, engage in speculative and nonmeritorious ventures, allow others to profit at the Trust's expense, and perform a host of other all-but-illegal acts—without being held to account. Such a result, we submit, so egregiously counters the public interest that this Court's supervisory power over the federal courts is called into play.

This Court has made clear that under traditional equity principles, "a trustee bears an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties," and "the rule against a trustee dividing his loyalties must be enforced with 'uncompromising rigidity.'" *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 329-330 (1981) (citation omitted). "[F]iduciaries owe their beneficiaries a duty of care as well as a duty of loyalty. . . ." *Air Line Pilots Ass'n* v. *O'Neill*, 111 S. Ct. 1127, 1134 (1991).[7]

Violation of a trust relationship—which clearly occurred in this case—is so serious as to warrant even the imposition of a constructive trust on the earnings from the publication of otherwise protected First Amendment materials. *Snepp* v. *United States*, 444 U.S. 507, 510, 515 (1980). And damages are an appropriate remedy. Even the United States has been held liable once it was established that it occupied the position of trustee and had acted improperly in its fiduciary relationship. *United States* v. *Mitchell*, 463 U.S. 206, 224-228 (1983).[8] "It is well established that

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[7] Thus, ERISA provides for personal liability for a fiduciary who breaches "any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title." 29 U.S.C. § 1109(a); *see Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134 (1985).

[8] *See also Nevada* v. *United States*, 463 U.S. 110, 142 (1983). *Cf. United States* v. *Mitchell*, 445 U.S. 535, 540-546 (1980). The

a trustee is accountable in damages for breaches of trust." *Id.* at 226.

Not so here. Respondents engaged in a variety of breaches of the trust imposed upon them, but they have been held *not* accountable by reason of one sentence in an agreement devised by the parties. The opposite rule is the applicable one. *See Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 111 (1989).

If the ruling below stands, a bankruptcy trustee—or any other trustee—could use the processes of a federal court to perpetrate a fraud, so long as he was careful not to overstep the line into outright dishonesty. He could, for example, improperly exclude property from the estate, *cf. United States* v. *Whiting Pools, Inc.*, 462 U.S. 198, 203 (1983); deliberately favor one creditor over another, *cf. Railway Labor Executives' Ass'n* v. *Gibbons*, 455 U.S. 457, 469 (1982); intentionally deny a creditor postpetition interest on a nonconsensual oversecured claim, *cf. United States* v. *Ron Pair Enters.*, 489 U.S. 235 (1989); wrongfully waive a bankrupt corporation's attorney-client privilege, *cf. Commodity Futures Trading Comm'n* v. *Weintraub*, 471 U.S. 343, 355 n.7 (1985); willfully minimize rather than maximize the value of an estate, *see id.* at 352; carry out his duties under a clear and direct conflict of interest, *cf. Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 115 (1989); purposely give an unfair and incomplete review of claim denials instead of the full and fair review that is required, *cf. id.* at 113; or even knowingly engage in sham or collusion, *cf. Navarro Sav. Ass'n* v. *Lee*, 446 U.S. 458, 465 (1980). He could do all of this because he was not acting dishonestly under the Bankruptcy Court's definition.

The courts below effectively turned over to the parties the determination not only of the Trustees' duties but the standards by which their conduct must be judged. Yet

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United States, as trustee, must "exercise great care" in administering its trust. *United States* v. *Mason*, 412 U.S. 391, 398 (1973).

it is precisely this reasoning that was rejected by this Court in *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. at 112, where the Court said:

> As they do with contractual provisions, courts construe terms in trust agreements without deferring to either party's interpretation. "The extent of the duties and powers of a trustee is determined by the rules of law that are applicable to the situation, and not the rules that the trustee or his attorney believes to be applicable, and by the terms of the trust *as the court may interpret them*, and not as they may be interpreted by the trustee himself or by his attorney." 3 W. Fratcher, Scott on Trusts § 201, at 221 (emphasis added).

This is a recognition that more than private interests are at stake. If a trustee is allowed to roam at will, harnessed only by the gauge of dishonesty, the public trust as well as private interests are compromised, legal principles are belittled, and faith in the rule of law is diminished in the eyes of those it serves.

If we turn to state law for guidance,[9] the result is the same.

Following the lead of Justice Cardozo for the New York Court of Appeals as early as 1928, state courts have adopted an "unbending and inveterate, [u]ncompromising rigidity" toward the duty of trustee fiduciaries, demanding not only honesty "but the punctilio of honor." *Meinhard* v. *Salmon*, 164 N.E. 545, 546 (N.Y. 1928) (cited with approval by this Court in *NLRB* v. *Amax Coal Co.*, 453 U.S. at 329-330). They have followed the general rule that trustees must act in good faith, use reasonable

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[9] This Court has pointed out that a trustee's powers under the Bankruptcy Code are limited by a judicially developed doctrine intended to protect legitimate state interests, so that a trustee, for example, cannot abandon trust property in contravention of local law designed to protect public health and safety. *Midatlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 500-506 (1986). *See also Butner* v. *United States*, 440 U.S. 48 (1979).

judgment, deal impartially with beneficiaries of the Trust, and exercise the care, skill and judgment of the ordinarily prudent person.[10] If the trustee has greater skills—as the attorney and CPA did in this case—they must exercise these greater skills.[11] Even a grant in a Trust Deed of absolute discretion does not authorize a trustee to neglect his trust or abdicate his judgment, which will be subject to judicial review.[12]

Exculpatory clauses in trust agreements are disfavored and are not enforced as to breaches of the trust committed in bad faith, intentionally, or with reckless indifference to the interests of the beneficiaries.[13] Exculpatory clauses have, in fact, been held void in the State involved here, Florida, because they attempted to immunize a party from the effects of his own fraud.[14]

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[10] *E.g., Eddy* v. *Colonial Life Ins. Co. of Am.*, 919 F.2d 747, 750-751 (D.C. Cir. 1990) (and cases there cited); *MCA Inc.* v. *United States*, 685 F.2d 1099, 1103 (9th Cir. 1982) (applying California law); *see duPont* v. *Southern Nat'l Bank of Houston*, 771 F.2d 874, 888 (5th Cir. 1985) (applying Texas law), *cert. denied*, 475 U.S. 1085 (1986).

[11] *E.g., Pension Benefit Guar. Corp.* v. *Greene*, 570 F. Supp. 1483, 1492-93 (W.D. Pa. 1983) (applying Pennsylvania law), *aff'd*, 727 F.2d 1100 (3d Cir.), *cert. denied*, 469 U.S. 820 (1984).

[12] *MCA Inc.* v. *United States*, 685 F.2d at 1103.

[13] *See, e.g., Dill* v. *Boston Safe Deposit & Trust Co.*, 175 N.E.2d 911, 913 (Mass. 1961) (and authorities there cited); *Wenzel* v. *Boyles Galvanizing Co.*, 920 F.2d 778, 781 (11th Cir. 1991) (applying Florida law); *University Plaza Shopping Center, Inc.* v. *Stewart*, 272 So.2d 507, 511-512 (Fla. 1973) (in Florida, any indemnity must be clear and explicit, and must cover every contingency); *Nat Harrison Assocs.* v. *Florida Power & Light Co.*, 162 So.2d 298, 299 (Fla. Dist. Ct. App. 1964), *cert. denied*, 166 So.2d 754 (Fla. 1964); *Bogert Trusts* § 542.

[14] *E.g., Zuckerman-Vernon Corp.* v. *Rosen*, 361 So.2d 804, 806 (Fla. Dist. Ct. App. 1978); *Fuentes* v. *Owen*, 310 So.2d 458, 459-460 (Fla. Dist. Ct. App. 1975) (including cases in other States).

Thus, the result below violates virtually every canon of trust law established by the federal and state courts. The exculpatory clause was favored and given all-encompassing meaning; it was not held void but, on the contrary, enforced to its full limit; instead of requiring good faith and reasonable judgment, the lower courts permitted every conceivable degree of mismanagement and culpability except outright dishonesty; and trustees with special skills were treated no differently than ordinary laymen.

This last point requires emphasis. McConnell, of course, was a Trustee attorney and an officer of the court. The beneficiaries had a right to assume on his part not only special skills and an added duty of care but an adherence to legal principles. McHale was a CPA who, from the outset, had divided loyalties and represented himself to the Petitioner beneficiaries as a professional looking out for their complex financial interests. If specialists such as Respondents McConnell and McHale are allowed to act in any manner they please short of stealing, the federal courts will have become a party to public policy violations of the highest order.

CONCLUSION

For each and all of the reasons above, the petition should be granted and the judgment below reversed.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-3686

D.C. Docket No. 90-719-CIV-T-17A

IN RE: CAPTRAN CREDITORS' TRUST,
Debtor.

CAPTRAN CREDITORS' TRUST, CLUB BAHA, LTD., and
TROPICAL PROPERTIES, LTD.,
Plaintiffs-Appellants,

versus

DAVID W. MCCONNELL, JR., GERARD A. MCHALE, and
MCHALE, EZZELL & CO., P.A.,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(November 10, 1992)

Before TJOFLAT, Chief Judge, EDMONDSON, Circuit Judge, and DYER, Senior Circuit Judge.

PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-1.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 90-719-CIV-T-17(A)

IN RE: CAPTRAN CREDITORS' TRUST,
Debtor.

CAPTRAN CREDITORS' TRUST, CLUB BAHA, LTD., a foreign corporation and TROPICAL PROPERTIES, LTD., a foreign corporation,
Appellants,

vs.

DAVID W. MCCONNELL, GERARD A. MCHALE, JR., and MCHALE, EZZELL AND CO., a Florida professional association,
Appellees.

Appeal from the United States Bankruptcy Court
for the Middle District of Florida

[Filed June 17, 1991]

This cause is before the Court on appeal from the Final Judgment of the Bankruptcy Court entered in this adversary proceeding in favor of appellees. Chief Bankruptcy Judge Alexander L. Paskay entered Final Judgment on April 17, 1990 upon the Findings of Fact, Conclusions of Law and Memorandum Opinion dated April 4, 1990.

STANDARD OF APPELLATE REVIEW

Findings of fact by the Bankruptcy Court will not be set aside unless clearly erroneous. Bankruptcy Rule 8013; *In re Downtown Properties, Ltd.*, 794 F.2d 647 (11th Cir. 1986). However, appellants are entitled to an independent, *de novo* review of all conclusions of law and the legal significance accorded to the facts. *In re Owens*, 86 B.R. 691 (M.D. Fla. 1988).

FACTS

1. In 1982, Captran Resorts International, Inc. (CRI), a corporation based in Lee County, Florida, was engaged in the business of developing resorts and selling timeshare interests to the public. CRI's president was Keith Trowbridge (Trowbridge).

2. CRI, through its president Trowbridge, entered into a joint venture with Club Baha, Ltd. (Club Baha) and Tropical Properties, Ltd. (Tropical Properties). Tropical Properties is the parent organization of Club Baha, its wholly owned subsidiary. Jack Grobowsky (Grobowsky) controlled Tropical Properties which developed resorts and timeshare interests in the Bahamas.

3. The CRI joint venture with Club Baha resulted in a disagreement and litigation between the parties. Club Baha sued CRI and it's president, Trowbridge, asserting fraud and breach of contract involving the development and marketing of a Club Baha timeshare resort in the Bahamas. A lengthy jury trial was held in the Circuit Court for Lee County, Florida. On May 18, 1982 Club Baha obtained a $1.7 million dollar final judgement for compensatory and punitive damages against CRI and Trowbridge.

4. CRI could not pay the $1.7 million Club Baha judgment lien and continue its resort development and timeshare business. Further, CRI could not post a supersedeas bond to avoid losing some, if not all, of its property.

5. On July 16, 1982, CRI filed a voluntary Petition for Relief under Chapter 11 of the Bankruptcy Code. Soon thereafter, CRI and some of its largest creditors, including Club Baha and Tropical Properties, entered into extensive negotiations. The purpose of their negotiations was to ultimately satisfy CRI's creditors and to resolve CRI's problems outside of the provisions of Chapter 11 and the Bankruptcy Court.

6. The negotiations resulted in the "Captran Creditors' Settlement Agreement" (Trust Agreement) which provided that the CRI creditors would form the Captran Creditors' Trust (CCT or Trust). It was later ruled that the Captran Creditors' Trust constituted a business trust under section 101(8) of the Bankruptcy Code. *In re Captran Creditors' Trust*, 53 B.R. 741 (Bankr. M.D. Fla. 1985). A copy of the Trust Agreement, a synopsis of its development, and copies of related documents are included in what is referred to as "the yellow book".

7. Appellants allege that appellee McHale negotiated the Trust Agreement for Club Baha. Appellees counter that McHale did not negotiate the agreement for Club Baha. Moreover, appellees contend that Domenic Massari (Massari), appellants' attorney, was instrumental in drafting the Trust Agreement as well as being the chief architect of the legal structure of the Trust. Appellees add that according to Grobowsky, Massari was the major author of the Trust Agreement. In their briefs, appellants do not refute that Massari authored the Trust Agreement.

8. The Trust Agreement was finalized in December, 1982. Based on the settlement, the Bankruptcy Court on December 6, 1982 entered an order granting CRI's motion to dismiss its Chapter 11 case. The Trust was effective following the final agreement.

9. CRI assets, and any debts and liabilities of those assets, including 1400 timeshare unit weeks at five different resort properties; undeveloped land; two mortgage portfolios and a promissory note, were transferred to the CCT to be the Trust res. CRI creditors were to be the CCT beneficiaries. Appellees McConnell, an attorney, and McHale, a Certified Public Accountant (Trustees), were appointed as initial trustees of CCT. CRI retained a residual interest in the CCT properties, if one remained after the liquidation of the Trust assets and after the satisfaction of the interests of the Trust beneficiaries.

10. Appellees McConnell and McHale were both familiar with the parties' businesses before appointment as Trustees. McConnell had significant business dealings with CRI and Trowbridge during the CRI bankruptcy. He was considered closely aligned with CRI and Trowbridge. McHale had previously been retained by Club Baha for financial and economic analysis during its litigation with CRI and Trowbridge. He was considered closely aligned with Club Baha and Grobowsky. CRI and the CCT beneficiaries sought to balance their competing interests by appointing these Trustees to administer the Trust.

11. A major asset of the CCT was the land of Sanibel Island Beach Club (SIBC), a phased development having multiple buildings upon completion. Building 10 was almost built however it was not certified for occupancy. The Trust owned the land for Buildings 8 and 9. CRI had building permits for Buildings 8 and 9 from before the commencement date of the Trust. The land for Buildings 5, 6, and 7 was also a Trust asset but no building permits had yet been issued. Appellees claim the building permits for Buildings 8 and 9 would have been lost had construction not commenced. Appellant Club Baha, and Growbowsky, claim that they were unaware that CRI had building permits for Buildings 8 and 9. The CCT and CRI were, in affect, dependent on each other concerning the SIBC development.

12. The CRI assets transferred to the CCT were to be marketed and sold. Net sales proceeds were to go to the Trust for the benefit of the Trust beneficiaries. Under the Trust Agreement, CRI was to act as the marketing agent for the CCT properties. In exchange, CRI would receive a 38% marketing fee based on the sale price of the properties it sold. The Trust Agreement allowed the CCT properties to be sold at a 10% discount. Discounts above 10% were deducted from CRI's 38% marketing fee with the Trust always getting 62% of the net sales proceeds. CRI acted as the marketing agent for the CCT properties.

13. Actual sales of the CCT property were handled by a real estate firm owned and controlled by Trowbridge. Northern American Title Insurance Agency, Inc. (NATIA), also owned and controlled by Trowbridge, processed the sales, handled closings, and maintained the records regarding the sales of timeshare unit weeks. All sales records of the Trust properties were under the exclusive control of George Mills (Mills), CRI's controller.

The Trustees received weekly sales reports on Trust inventory, monthly schedules of closed sales, monthly balances in escrow, cumulative showings of use of escrow funds for development and construction purposes, escrow draw approvals and draw requests from the construction company. In addition, the Trustees met approximately bi-weekly with Mills.

14. The Trust Agreement stated the purpose of the Trust as follows:

> Purpose: This Trust is organized for the primary purpose of liquidating the assets transferred to it with no objective to continue or engage in the conduct of a trade or business.

The Trust Agreement also had a provision regarding Trustee liability. It stated:

> Trustee Liability: Except for proven dishonesty, a Trustee shall not be personally liable for any act or omission in connection with his duties as Trustee.

As noted above, the Trust Agreement was the product of the parties after extensive negotiations.

15. In 1983, CRI continued developing Buildings 8 and 9 at SIBC. The land for those Buildings was a Trust asset to be liquidated under the stated purpose of the Trust Agreement. The Trustees agreed, at least tacitly, to this activity by CRI, and at no time voiced any objection to it. On the contrary, appellee McHale consented to this development believing it would maximize the return to the Trust beneficiaries. Grobowsky first learned that Buildings 8 and 9 were being developed in July, 1983. It appears that even though the Trust Agreement did not authorize any additional development, the effect of developing Buildings 8 and 9 resulted in a net benefit to the Trust of $1.7 million dollars.

16. In 1983 the Trustees and Grobowsky both tried selling the CCT assets in bulk. No buyer was found. Next, Club Baha suggested that CCT assets be liquidated to the Trust beneficiaries. The Trustees developed a liquidation plan to distribute the Trust assets in-kind to the CCT beneficiaries. In exchange, the Trust beneficiaries would extinguish their interests in the Trust.

17. CRI, in the Fall of 1983, resisted the in-kind distribution plan and threatened to sue the Trustees if they proceeded with the plan. CRI resisted the plan because it held a residual interest in the Trust properties.

18. In February, 1984 the Trustees filed a suit for declaratory relief requesting that the Circuit Court for Lee County, Florida approve the in-kind distribution. Furthermore, the Trustees sought a temporary restraining order to remove CRI as the marketing agent for the CCT assets. The temporary restraining order was denied. The in-kind distribution plan never materialized.

19. During the pendency of the declaratory suit in the Circuit Court for Lee County, several of the CCT beneficiaries assigned their Trust interest to Club Baha. As a result, Club Baha, controlled by Grobowsky, held over 90% of the beneficial interest of the Trust.

20. On August 27, 1984, Grobowsky, as president of Club Baha and Tropical Properties, and on behalf of 90% of the Trust beneficiaries, discharged McHale and McConnell from their duties as Trustees. At that time, the Trust had $1,824.00 in cash; $346,268.00 cash in escrow awaiting release of Grobowsky's lien to close; $972,089.00 in mortgage notes receivable awaiting release of Grobowsky's lien to close; ninety-six timeshare unit weeks at SIBC and four hundred eighty-five timeshare unit weeks in other timeshare resorts. Successor Trustees were appointed.

21. On August 30, 1984, the successor Trustees reached an agreement between Club Baha and the Trust. Their agreement provided that the new Trustees would transfer the bulk of the CCT assets to Club Baha in exchange for Club Baha's interest in the Trust. Throughout the Fall of 1984, Club Baha and the successor Trustees made final plans to execute the agreed upon exchange.

22. In October, 1984, McHale submitted the final accounting of his Trusteeship. The report that McHale submitted was prepared by Mills, CRI's controller. The report was a poor final accounting, merely compiling the Trust assets as they existed when the Trust was created.

23. On January 9, 1985, parties claiming to be CCT creditors filed an involuntary bankruptcy petition against the Trust. That filing held up the plans to transfer the CCT assets to Club Baha. In October, 1985, Judge Paskay ruled that the Captran Creditors' Trust was a business trust and as such it could in fact file for bankruptcy. *In re Captran Creditors' Trust*, 53 B.R. 741 (Bankr. M.D. Fla. 1985). On June 26, 1986, CCT consented to entry of

an order converting the case to a voluntary Chapter 11. Next, Club Baha and Grobowsky proposed a total liquidation plan as the Plan of Reorganization. That plan was confirmed resulting in an in-kind distribution of the CCT assets to the Trust beneficiaries. That in-kind distribution plan was very similar to the one originally planned by McConnell and McHale.

24. On May 7, 1987, appellants filed a three-count Complaint against the appellees. Count I sought compensatory and punitive damages against McConnell and McHale for alleged breach of their fiduciary duties. In Count II, appellants sought compensatory and punitive damages for professional negligence by McConnell and McHale. In Count III, appellants sought damages and other relief from appellees McConnell, McHale, and McHale, Ezzell, and Co., P.A. (MEC) for their alleged violations of Section 772 of the Florida Statutes.

25. McConnell failed to timely file an answer to appellants' Complaint. A Clerk's default was entered against McConnell. Subsequently, appellants filed a three-count Amended Complaint against appellees. Appellants claim in Count I was based on the contention that McHale, in his representative capacity as co-Trustee, breached his fiduciary duty to the Trust beneficiaries. In Count II, appellants caimed that McHale was liable for damages which appellants allegedly incurred as a result of McHale's purported negligence as a CPA. Count III was the same as Count III in the initial Complaint.

26. Appellants claim that Club Baha's alleged damages through December, 1990 are $2.960,859.30. In addition, they allege that the Trust suffered total damages of $3,267,965.00. Appellees refute the alleged damages, charging that the appellants failed to prove that a breach occurred or that any breach proximately caused their alleged injury. Further, appellees contend that appellants have not proffered evidence to support their damage claims

and an exculpatory clause relieves the Trustees of any personal liability.

27. During 1988 and 1989, the Bankruptcy Court held many evidentiary hearings on this dispute. The parties submitted their final arguments in early 1990. Final Judgment was entered on April 17, 1990 in favor of the appellees on Counts I and II of appellants' Complaint. Count III of the appellants' Complaint was dismissed after the final evidentiary hearing. In addition, the Bankruptcy Court withheld entering a final judgment against McConnell who had earlier defaulted.

28. The Bankruptcy Court held that McHale did not breach his fiduciary duties as Trustee of the CCT. The Court also held that the exculpatory clause in the Trust Agreement was not against public policy. It concluded that McHale was not a dishonest Trustee; thus, he would not be personally liable for his activities as Trustee under the exculpatory clause of the Trust Agreement.

The Court based its conclusions on the appellants failure to prove breach of duty and dishonesty as well as upholding the exculpatory clause in the Trust Agreement. The Court withheld entering Final Judgment against McConnell because the appellants offered no meaningful evidence about his conduct as co-Trustee.

ISSUES

I. WHETHER THE PROFESSIONAL TRUSTEES BREACHED THEIR FIDUCIARY DUTIES UNDER THE TRUST AGREEMENT DIRECTLY RESULTING IN INJURY TO THE APPELLANTS.

II. WHETHER THE COURT SHOULD ENTER A FINAL DEFAULT JUDGMENT AGAINST McCONNELL WHERE A DEFAULT WAS ALREADY ENTERED AGAINST HIM AND WHERE HE BREACHED HIS FIDUCIARY DUTIES AS ATTORNEY/TRUSTEE DIRECTLY RESULTING IN INJURY TO THE APPELLANTS.

III. WHETHER McHALE AND McHALE, EZZELL, & COMPANY P.A., OWED A CPA DUTY OF CARE TO THE APPELLANTS WHICH WAS BREACHED AND WHICH DIRECTLY RESULTED IN INJURY.

DISCUSSION

I. THE TRUSTEES DID NOT BREACH THEIR TRUST AGREEMENT FIDUCIARY DUTIES TO THE TRUST BENEFICIARIES. MOREOVER, HAD A BREACH OCCURRED, THE TRUST AGREEMENT ESTABLISHES PROVEN DISHONESTY AS THE ONLY BASIS FOR TRUSTEE LIABILITY.

The Court must consider whether the Bankruptcy Court erred in deciding that the Trustees did not breach their duty. Florida law is well settled concerning the duties and liabilities of trustees.

Two Florida Statutes specifically address the general duties of trustees and their standard of care and performance.

Section 737.301, *Florida Statutes*, states:

> Except as specifically provided, the general duty of the trustee (is) to administer a trust diligently for the benefit of the beneficiaries. . . .

Section 737.302, *Florida Statutes*, addresses a trustee's standard of care and performance as follows:

> Except as otherwise provided by the trust instrument, the trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent trustee dealing with the property of another. If the trustee has special skills, or is named trustee on the basis of representations of special skills or expertise, he is under a duty to use those skills.

Florida case law is likewise well settled regarding trustee duties and liabilities. Trustees must exercise due care, diligence, and skill in the administration of the trust. *Thomas v. Carlton*, 143 So. 780, 785 (Fla. 1932). Further, trustees are expected to "act in exacting good faith" while carrying out their duties in the administration of the trust. *Voorhies v. Blood*, 173 So. 705, 708 (Fla. 1937).

The parties who create a trust can and should include the trustees' standard of care and duties in the trust instrument. Section 737.302, *Florida Statutes*, expressly permits such drafting when it states "Except as otherwise provided by the trust instrument. . . ." In the instant case the Trustees' standard of care and performance was not delineated in the Trust Agreement. The Trust Agreement stated the purpose of the Trust as follows:

> Purpose: This Trust is organized for the primary purpose of liquidating the assets transferred to it with no objective to continue or engage in the conduct of a trade or business.

The initial burden is on the trust beneficiaries to prove that a breach of duty occurred which proximately caused the injury. *Ft. Myers Memorial Gardens v. Barnett Banks*, 474 So.2d 1215, 1218 (Fla. 2d DCA 1985). If that is established, the burden shifts to the trustee to demonstrate that the loss would have occurred in the absence of a breach. *Id.* at 1218. In the instant case, there is an exculpatory clause in the Trust Agreement limiting the Trustees' personal liability except for "proven dishonesty".

The Bankruptcy Court ruled that the appellants did not sustain their burden of proof to establish that McHale breached his duty. That ruling followed many months of evidentiary hearings in which the parties had ample opportunity to present extensive evidence and testimony. The Bankruptcy Court reached that determination in spite of sharp criticism about McHale's performance as Trustee of the Captran Creditors' Trust.

Rule 8013 of the bankruptcy rules, which this Court applies in this case, mandates the application of the "clearly erroneous" standard of review to the Bankruptcy Court's finding of fact. As stated by the United States Supreme Court:

> The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the fact is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much.

Anderson v. City of Bessemer, 470 U.S. 564, 574-75, 105 S.Ct. 1504, 1512, 84 L.Ed.2d 518, 529 (1985). *See also*,

Richmond Leasing Co. v. Capital Bank, N.A., 762 F.2d 1303 (1985).

Finding the Court's reasoning in *Anderson* equally applicable to this case, this Court finds nothing clearly erroneous about the Bankruptcy Court's conclusion that McHale did not breach his duty as Trustee of the Captran Creditors' Trust. The lower Court's conclusion is well supported by the fact that the CCT was not an ordinary Trust. Moreover, McHale had an unenviable task of administering a Trust in which the parties actively participated while protecting competing interests.

The next issue for discussion is the exculpatory clause in the Trust Agreement. This court reviews that issue without conceding that a breach occurred to invoke that provision of the Trust Agreement. Technically, any consideration of the exculpatory clause is moot until appellants prove that a predicate breach occurred resulting in injury.

In the instant case, the Trust Agreement has an exculpatory clause pertaining to Trustee liability. The actual provision states as follows:

> Trustee Liability. Except for proven dishonesty, a Trustee shall not be personally liable for any act or omission in connection with his duties as Trustee.

There is no recital in the Trust Agreement defining what the parties meant by dishonsty. The Trust Agreement was the product of extensive negotiations, it was freely negotiated, and the parties were represented. In addition, Massari, appellants' attorney, was instrumental in drafting the Trust Agreement.

Appellants contend that the exculpatory clause in the Trust Agreement is against public policy and repugnant to the law. Moreover, appellants argue that public policy dictates that, at most, the exculpation provision only immunized appellees from liability for good faith errors in judgment.

Exculpatory clauses as a general rule are neither for or against public policy. Each exculpatory clause deserves independent review based on many considerations. Foremost in any review is the language of the exculpatory clause and whether it applies to the instant case. Other factors include, but are not limited to: how the exculpatory clause limits liability, intent of the parties, and the manner in which the exculpatory clause was made a part of the agreement.

The Bankruptcy Court accurately summarized the law concerning exculpatory clauses. The Courts have upheld exclupatory provisions in trust agreements. *Morrissey v. Curran*, 483 F.2d 480 (2d Cir. 1973), *cert. denied*, 414 U.S. 1128 (1974). *See also, Kolentus v. Avco Corp.*, 798 F.2d 949 (7th Cir. 1986), *cert. denied*, 479 U.S. 1032 (1987). Generally, exculpatory clauses are construed according to their plain meaning against the trustee. *Knauer v. Barnett*, 360 So 2d 398, 405 (Fla. 1978). Exculpatory clauses will not save a trustee from liability for certain breaches deemed especially reprehensible, for example, willful and intentional breaches, acts of bad faith, dishonesty, acts of gross negligence, and the like. G. Bogert, *Trusts*, 94 (6th ed. 1988).

No Florida cases are cited to define exactly what dishonesty means as it pertains to trustees. Appellants cite *Miami National Bank v. Pennsylvania Insurance Co.*, 314 F. Supp. 858, 868 (S.D. Fla. 1970), for the proposition that "dishonest" conduct is a reckless disregard for the beneficiaries' interests. Appellants also cite *Brandon v. Holman*, 41 F.2d 586, 588 (4th Cir. 1930) as authority that "dishonesty can be committed by passive permission, or failure to prevent, or helping by not hindering when it is one's duty to prevent or by negligence or by voluntary oversight." The *Brandon* court ruled that "*connivance with others* (emphasis added) may be committed by passive permission, or failure to prevent, or helping by not hindering when it is one's duty to prevent, or by negligence or voluntary oversight." *Id.* at 588. Later in

the *Brandon* decision, connivance was defined as "an agreement or consent, indirectly given, that something unlawful shall be done by another." *Id.* at 588. In *Glen Falls Indem. Co. v. National Floor & Supply Co.*, 239 F.2d 412, 413 (5th Cir. 1965) the Fifth Circuit stated that "for an act to be 'dishonest' within the meaning of a fidelity suretyship bond, there must exist the element of moral turpitude or want of integrity."

The Bankruptcy Court upheld the exculpatory clause in the Trust Agreement. This Court concludes that as a matter of law, the Bankruptcy Court did not err in upholding the exculpatory clause in the Trust Agreement. The exculpatory clause in the instant case was part of a Trust Agreement produced through extensive negotiations. The parties were in equal bargaining positions, knowledgeable and represented by counsel. Further, appellants' attorney was instrumental in drafting the Trust agreement. This Court finds no reason to conclude that the exculpatory clause in the instant case is against public policy or repugnant to the law of Florida.

As a related matter, this Court finds nothing "clearly erroneous" about the Bankruptcy Court conclusion that McHale was not a dishonest Trustee.

II. THE BANKRUPTCY JUDGE DID NOT ERR BY WITHHOLDING A FINAL DEFAULT JUDGMENT AGAINST McCONNELL EVEN THOUGH A DEFAULT WAS ENTERED AGAINST HIM.

Defaults in adversary proceedings are governed by Rule 55, Fed. R. Civ. P. *See* Bankruptcy Rule 7055.

Fed. R. Civ. P. 55 provides:

> Rule 55. Default
>
> (a) Entry. When a party against whom a judgment for affirmatvie relief is sought has failed to plead or otherwise defend as provided by the rules and that

> fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.
>
> (c) Setting Aside Default. For good cause shown the court may set aside an entry of default. . . .

Appellee and co-Trustee McConnell failed to timely file an answer to appellants' initial Complaint. A default was entered against him by the Clerk before trial commenced in the Bankruptcy Court. Appellants filed an Amended Complaint after the Clerk's default was entered against McConnell. Appellee McConnell did not attend the trial that was held in the Bankruptcy Court.

The Bankruptcy Court did not enter a Final Judgment against McConnell. It held that appellants presented no meaningful evidence concerning McConnell's conduct as co-Trustee. In light of that, the Bankruptcy Court decided it was inappropriate to enter a judgment against McConnell.

This Court holds as a matter of law that Judge Paskay correctly exercised his discretion in not entering final judgment against appellee McConnell. The disposition of a motion for entry of a default judgment lies within the court's sound discretion. *Mason & Hanger-Silas Mason Co. v. Metal Trades Council*, 726 F.2d 166 (5th Cir. 1984). Generally, the Court considers a variety of factors when exercising its discretion for entry of a default judgment. This Court favors decisions on the merits and finds no reason to conclude that Judge Paskay abused his discretion in withholding final judgment against appellee McConnell.

III. McHALE, AND McHALE, EZZELL & CO., P.A. DID NOT BREACH THEIR CPA DUTY OF CARE TO APPELLANTS.

Section 737.302, *Florida Statutes*, states in part:

> . . . If a trustee has special skills, or is named trustee on the basis of representations of special skills or expertise, he is under a duty to use those skills.

The parties and the Bankruptcy Court do not disagree that Section 737.302 applies to the Trustees of the Captran Creditors' Trust. However, the parties disagree on whether McHale used his CPA skills while a Trustee and whether his CPA firm is includable in this action because McHale acted as a Trustee.

Based on expert testimony, the Bankruptcy Court concluded, that McHale did not fall below the standards of a CPA. Given that conclusion, it follows that McHale's CPA firm is not liable.

There are no Florida decisions concerning trustees with special skills or trustees duty to use special skills under Section 737.302, *Florida Statutes*. Based on the plain meaning of the statute, this Court concurs that McHale had a duty to use his CPA skills while he was a Trustee of the Trust.

This Court defers to Judge Paskay as the trier of fact on the evidentiary issues of this case. As noted earlier, Rule 8013 of the bankruptcy rules, mandates the application of a "clearly erroneous" standard of review to the Bankruptcy Court's findings of fact. This Court finds nothing clearly erroneous about the Bankruptcy Court's conclusion concerning whether McHale used his CPA skills. Judge Paskay heard expert testimony from both sides and concluded that appellants did not sustain their burden of proof.

CONCLUSION

This Court, having carefully considered the issues on appeal, and based on the foregoing, concludes that the Bankruptcy Court did not err in its decision denying Appellants' claims. Accordingly, it is

ORDERED that the Bankruptcy Court's Final Judgement entered on April 17, 1990 is AFFIRMED. The Clerk of this Court is directed to enter judgement for Appellees in accordance with this Order, and dismiss the case.

DONE and ORDERED in Chambers, in Tampa, Florida, on this the 14th day of June, 1991.

/s/ Elizabeth A. Kovachevich
ELIZABETH A. KOVACHEVICH
United States District Judge

Copies to:

All parties and counsel of record

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 85-0045-8P1

IN RE: CAPTRAN CREDITORS' TRUST,
Debtor

Adv. No. 87-158

CAPTRAN CREDITORS' TRUST, CLUB BAHA, LTD., a foreign corporation and TROPICAL PROPERTIES, LTD., a foreign corporation,
Plaintiff

v.

DAVID MCCONNELL, GERALD MCHALE, and MCHALE, EZZELL AND CO., a Florida professional association,
Defendants

FINDINGS OF FACT, CONCLUSIONS OF LAW AND MEMORANDUM OPINION

THIS is a confirmed Chapter 11 case, and the matter under consideration is a three-count Complaint by Captran Creditors Trust (CCT), Club Baha, Ltd. (Club Baha), and Tropical Properties, Ltd. (Tropical Properties) against David McConnell (McConnell), Gerald McHale (McHale), and McHale, Ezzell and Co., P.A. The Plaintiffs seek both compensatory and punitive damages in Count I based on the alleged breach of fiduciary duty owed to the Plaintiffs by Defendants McConnell and

McHale. The Plaintiffs in Count II seek compensatory and punitive damages for the alleged professional negligence of Defendants McConnell and McHale. In Count III, the Plaintiffs seek damages and other relief from Defendants McConnell, McHale, and McHale, Ezzell, and Co. for their alleged violations of § 772 of the Florida Statutes.

Although Defendant McConnell failed to timely file an answer to the Plaintiffs' Complaint and a default was entered against him by the Clerk before this trial commenced, a final judgment was not entered against McConnell. Additionally, Count III of the Plaintiffs' Complaint was dismissed by Order of this Court after the conclusion of the evidence presented at the final evidentiary hearing. This leaves for consideration the claims set forth in Counts I and II of the Complaint, that is whether McHale is liable for damages based on a breach of fiduciary duty and based on alleged negligence of a professional.

This Court, having heard extensive testimony of witnesses and having considered the documentary evidence, together with the record, now finds and concludes as follows:

In 1982, Captran Resorts International, Inc. (CRI), a corporation based in Lee County, Florida, was engaged in the business of developing resorts and selling timeshare interests to the public. At the same time, CRI through its president, Keith Trowbridge, entered into a joint venture with Club Baha and Tropical Properties, which were controlled by Jack Grabowski, for the development of a similar enterprise in the Bahamas. A disagreement between the parties resulted in litigation which ultimately concluded with a $1.7 million Final Judgment against CRI and its president, Trowbridge, and in favor of Club Baha and Tropical Properties. (Plaintiffs' Exh. No. 1.)

CRI, faced with the inability of satisfying the judgment and the possibility of losing some, if not all, of its

property because it could not post a supersedeas bond, filed a voluntary Petition for Relief under Chapter 11 of the Bankruptcy Code in this court on July 16, 1982. Soon after CRI filed its bankruptcy petition, CRI and some of its largest creditors, including Club Baha and Tropical Properties, entered into extensive negotiations. The purpose of their negotiations was to ultimately satisfy CRI's creditors and to resolve CRI's problems outside of the provisions of Chapter 11 and the bankruptcy court. (Plaintiffs' Exh. No. 1.)

The negotiations resulted in an agreement which provided that the creditors of CRI would form a trust, Captran Creditors Trust (CCT). The assets of CRI, with one minor exception, were to be transferred to CCT to be the Trust res, and the creditors of CRI were to be the Trust beneficiaries. The Defendants McConnell, an attorney, and McHale, a certified professional accountant (CPA), were appointed as the initial Trustees for this newly created Trust. A copy of the Agreement, a synopsis of its development, and copies of related documents are included in what is referred to as "the yellow book." (Plaintiffs' Exh. No. 2.) The Agreement was finalized in December, 1982. Based on the settlement, this Court entered an Order granting CRI's Motion to Dismiss the Chapter 11 case of CRI on December 6, 1982.

The Agreement provided that CCT would acquire from CRI certain specified assets of CRI and would assume any debts and liabilities associated with those assets. The assets transferred to CCT would be marketed and sold, and the net proceeds of the sales would go to the Trust for the benefit of the Trust beneficiaries. Under the Agreement, CRI was to act as the marketing agent for the Trust properties and, as a condition of the Agreement, was to receive 38% of the sale price of the properties sold.

CRI did, in fact, act as the marketing agent for the Trust properties. All sales were through a real estate

firm owned and controlled by Trowbridge, and they were processed through Northern American Title Insurance Agency, Inc. (NATIA), a title company also owned and controlled by Trowbridge. All sales records of the Trust properties were under the exclusive control of CRI's controller, George Mills (Mills), and there is no doubt that McHale acepted the recordkeeping of Mills without question or without any independent verification. NATIA handled all closings and maintained all of the records regarding the sales of timeshares. Evidence produced at trial leaves no doubt that neither McHale nor McConnell kept any records regarding the sales transactions; instead, they simply let Trowbridge and NATIA handle all of the details regarding the sales and recordkeeping of CRI.

The Agreement specifically described the Trustees' duties, powers, and liabilities. Regarding the Trustees' liability, the Agreement provided that "except for *proven dishonesty*, a Trustee shall not be personally liable for any act or omission in connection with his duties as Trustee." (Plaintiffs' Exh. No. 1 at p. 117.) (emphasis supplied) The Agreement further provided that the Trust was created "for the primary purpose of liquidating the assets transferred to it with no objective to continue or engage in the conduct in any trade or business."

Notwithstanding the stated purpose of the Trust, i.e., to liquidate the Trust assets, the evidence presented clearly established that CRI continued to develop and build on two of the undeveloped properties conveyed to the Trust by the Agreement. The record leaves no doubt that the Trustees agreed, at least tacitly, to this activity by CRI, and at no time voiced any objection to it. On the contrary, McHale consented to this development because he believed it would maximize the return to the beneficiaries of the Trust. It appears that even though the Trust Agreement did not authorize any additional development, this development produced a net benefit to the

Trust to the extent of $1.7 million. (Defendant's Exh. No. 7.)

It further appears that both the Trustees and Grabowski attempted to sell all of the Trust assets in bulk, but were unable to find a buyer. (Defendant's Exhs. No. 51, No. 52.) To solve their dilemma, the Trustees developed a liquidation plan pursuant to which the Trust assets would be distributed in-kind to the beneficiaries of the Trust in exchange for extinguishing their beneficiary interest in the Trust. (Plaintiffs' Exh. No. 66.) However, CRI resisted in-kind distribution (Defendant's Exh. No. 6), and threatened to sue the Trustees if they proceeded with this plan. (Defendant's Exh. No. 6.) This resistance by CRI is understandable in light of a provision in the Agreement which preserved for CRI any residual interest in the Trust properties, if one remained after the liquidation of the Trust assets and after the satisfaction of the interest of the Trust beneficiaries.

In order to protect their position, the Trustees filed a suit for declaratory relief requesting that the Circuit Court of Lee County, Florida approve the in-kind distribution. The Trustees also sought a temporary restraining order to remove CRI as the marketing agent for the Trust assets; however, that request was denied. (Defendant's Exhs. No. 44 and No. 47.) While this in-kind distribution was clearly contemplated by the Agreement, it was never consummated. Be that as it may, this Court is satisfied that the Trustees did nothing improper by promulgating this plan, and certainly they were not negligent for trying to effectuate this type of distribution. (Plaintiffs' Exh. No. 1.)

During the pendency of the declaratory suit in the Circuit Court of Lee County, several of the Trust beneficiaries assigned their interest in the Trust to Club Baha. As a result, Club Baha ended up with over 90% of the beneficial interests of the Trust. Soon after the assignments were made, Grabowski, as president of Club

Baha and Tropical Properties Ltd. and on behalf of 90% of the Trust beneficiaries, discharged McHale and McConnell from their duties as Trustees and appointed successor Trustees. (Plaintiffs' Exh. No. 44.) McHale submitted as his final accounting of his Trusteeship a report prepared by Mills (Plaintiffs' Exh. No. 2). By all accounts, this report did not even come close to being an acceptable final accounting of a trustee, and it did not pretend to be one. The report was nothing more than a compilation of the Trust assets and the beneficiary interests that existed at the time the Trust was created; it did not reflect what really existed when McHale's Trusteeship ended.

The successor Trustees and Club Baha then entered into an agreement pursuant to which the successor Trustees agreed to convey the bulk of the Trust assets to Club Baha, in exchange for Club Baha's interest in the Trust. Before the transfer of the Trust assets by the successor Trustees to Club Baha was finalized, certain parties who claimed to be creditors of CCT filed an involuntary Petition against CCT in this Court. After extensive preliminary skirmishes and prior to the trial, CCT finally consented to the entry of the order for relief on the eve of the trial. The Plan of Reorganization proposed by Club Baha and Grabowski, which was a total liquidation plan, was ultimately confirmed. This Plan of Reorganization basically produced the very same result that was contemplated by the in-kind distribution plan proposed by the original Trustees, McHale and McConnell.

Based on the foregoing facts, the Plaintiffs filed a three-count Amended Complaint against the Defendants. The Plaintiffs' claim in Count I is based on the contention that McHale, in his representative capacity as co-Trustee, breached his fiduciary duty to the Trust beneficiaries. In support of this proposition, the Plaintiffs contend that McHale owed a duty to discharge his obligation as Trustee in good faith and with ordinary care and dili-

gence. The Plaintiffs argue that McHale breached that duty, especially because he earlier served as an accountant for Club Baha and Tropical Properties before the Trust was even formed, and he therefore owed a special fiduciary duty to these Plaintiffs. The claim in Count II is based on the contention that McHale is liable for damages which the Plaintiffs allegedly incurred as a result of McHale's purported professional negligence as a CPA. As noted earlier, the claim in Count III was dismissed by this Court at the close of the evidence.

This record leaves no doubt that the conduct of McHale as a Trustee certainly left a lot to be desired, and that his detached, lackadaisical attitude toward the Trust affairs may be charitably characterized at most as benign neglect. McHale's lack of involvement with the trust was clearly evidenced by his unquestioned acceptance of the Mills Report as a final accounting of his Trusteeship. In addition, it is clear from the record that McHale granted almost a complete free reign to Trowbridge, Mills and NATIA involving sales of Trust assets, sales closings, and the recordkeeping of the Trust assets. It must be conceded that *Fla. Stat.* § 737.302 provides that a trustee with special skills is under a duty to use those skills. Thus, if McHale's performance is measured by the standard of a CPA who was engaged to serve in that capacity, one would be hard pressed to conclude that his performance met the standards of a reasonable CPA.

The Plaintiffs also argued that McHale should be held to a higher standard when his performance as Trustee is evaluated. Specifically, the Plaintiffs contended that because McHale represented the Plaintiffs Tropical Properties and Club Baha in connection with their 1982 litigation against CRI, he owed a special fiduciary duty to the Plaintiffs.

Considering the proposition urged by the Plaintiffs, this Court is satisfied that McHale was not engaged to serve as a CPA-Trustee. Further, McHale is not bound

by any special higher standard because the firm in which he is an accountant represented the Plaintiffs Tropical Properties and Club Baha in their litigation against CRI.

The Trust Agreement does not provide that McHale was to serve as a CPA for the benefit of the Trust. The yellow book does provide a brief history of McHale's background, and includes the fact that he was a partner in the accounting firm which represented the Plaintiffs Tropical Properties and Club Baha in their litigation against CRI. However, it is clearly stated in the yellow book that the biographical sketch and disclosure of the Trustee's business interest was made available because it might appear that there was a conflict of interest between the Trustee and CCT. (Plaintiffs' Exh. No. 1.) Alternatively, assuming without admitting, that if McHale is judged as a CPA Trustee, this Court is satisfied that the expert testimony presented at trial showed that McHale did not, in fact, fall below the standards of a CPA, and the Plaintiffs did not prove otherwise by clear and convincing evidence.

The exculpatory clause in the Trust Agreement specifically addresses the liability of a trustee in the exercise of his duties as a trustee. Thus, the ultimate question is whether or not the enforcement of this exculpatory clause would be contrary to public policy and should be disregarded, or whether this Court should give full effect to the unambiguous language of the Trust Agreement. There is no doubt that Grabowski was a highly sophisticated businessman, and the parties were of equal bargaining power. This was certainly an arm's length transaction. The Trust beneficiaries cannot argue that they were either ill-represented or unsophisticated. This Court is satisfied that it is appropriate to enforce this exculpatory clause.

Considering the exculpatory clause, it should be noted that several courts have upheld exculpatory provisions in trust agreements. An exculpatory clause in a trust agree-

ment which provided that the trustees shall not be liable for the making of any investments, nor for any loss or diminution of the trust fund "except due to their own willful misconduct" was upheld in *Morrissey v. Curran*, 483 F.2d 480 (2d Cir. 1973). A similar provision was used to exonerate a trustee bank of liability, notwithstanding the Plaintiff's argument that the provision served to excuse the trustee from exercising reasonable care in managing the Plaintiff's pension assets. *Kolentus v. Avco Corp.*, 798 F.2d 949 (7th Cir. 1986).

This Court recognizes that although a Trustee's liability may be limited in a Trust, such a limiting provision will be strictly construed against the Trustee and will not save the Trustee from liability for bad faith. 56 *Fla. Jur 2d* § 47. It is equally axiomatic, however, that a Trust provision will be construed according to its plain meaning where the words are not uncertain or ambiguous. 56 *Fla. Jur. 2d* § 5, 76 *Am. Jur. 2d* § 19, *Knauer v. Barnett*, 360 So. 2d 398, 405 (Fla. 1978). Based on the evidence presented at trial, this Court is satisfied that although McHale might have acted in a less than professional manner and may possibly have acted beneath the standard of sound business practices, he was not dishonest. In fact, there is not one scintilla of evidence in this record which would support a claim that he acted in a dishonest fashion while dealing with the Trust assets. There were neither allegations nor evidence that McHale engaged in self-dealing, or that he profited from his actions as a co-Trustee. This Court is therefore satisfied that absent any showing of dishonesty on his part, he cannot be held personally liable for any acts or omissions in the performance of his duties as co-Trustee.

As noted earlier, the Clerk previously entered a default against Defendant McConnell, but no final judgment has been entered by default against McConnell. In light of the fact that there was no meaningful evidence presented by the Plaintiff concerning any conduct by McConnell, who is a co-Trustee, this Court is satisfied that it would

not be appropriate to enter a judgment against this Defendant in spite of the fact of the entry of the default.

A separate Final Judgment will be entered in accordance with the foregoing.

DATED at Tampa, Florida, on April 4, 1990.

/s/ Alexander L. Paskay
ALEXANDER L. PASKAY
Chief Bankruptcy Judge

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